



Informal Hearing Determination

Company: Pigeon Creek Processing Corporation **Permit No.:** 1501773
Subject: Notice of Violation # CEV0006983 **Violation No.:** 1 of 1 (EF)
Conference: March 17, 2010 at 10:00 AM **Location:** Mine site
Participants: Thomas Mullins (Manager Engineering), Phil Mullins (Director of Permitting and Environmental Affairs), Eddie Varner (DMLR Mineral Specialist 1)

Summary of Informal Hearing

Mr. Mullins stated that there was no effluent violation because there was no discharge from NPDES point 002. Mr. Mullins stated that pond #3 was added under revision # 0502326 in 2001. He stated that this revision had a “drop box” that would allow water from pond #3 to discharge directly into the pipe that carried Callahan Creek under this portion of the permit. Mr. Mullins provided the hearing’s officer with an excerpt from that revision (see attachment # 1). He stated that when pond #3 was constructed, the actual pond location was moved back so that the pond was not over the pipe that carried Callahan Creek. He stated that the “drop box” was installed but the top of it was above ground level. He also said that revision # 9508863 contained an as-built pond certification that showed actual field construction of the pond with a rock spillway. Mr. Mullins stated that drainage from the pond by-passes the “drop box”. Mr. Mullins provided the hearing’s officer with an excerpt from revision # 9508863 (see attachment # 2) that contained the as-built certification for pond #3. (Please note that this hearing’s officer had Mr. Mullins to add the location of the “drop box” in relation to the spillway of pond #3 and to add the direction of flow upon exiting the pond’s spillway on the as-built certification. This hearing’s officer also had the DMLR Inspector to show the location of where the sample was obtained.)

Mr. Mullins stated that the coal being stockpiled was causing an effluent problem so the company allowed the drainage to by-pass discharge point 002. He stated that this drainage was treated by other ponds. However; after the N.O.V. was issued, the drainage was treated at pond #3 to comply with the N.O.V.

Mr. Mullins referred to and provided a copy of “**NPDES Permit Conditions**” that DMLR issues with each permit. (See attachment # 3). He cited section (d) “**Duty to Mitigate**” of that document and stated that according to their NPDES permit conditions, the company had a duty to mitigate any discharge that was in violation. Mr. Mullins also cited section M “**Discharge (of a pollutant)**” and section DD “**Point Source**” contained under **NPDES PERMIT DEFINITIONS** of the same document. He stated that by definition there was no discharge of a pollutant into the waters of the United States. He stated that the company elected to mitigate the discharge by allowing the iron to drop out by aeration and passing it through other NPDES outfall points prior to discharging into the waters of the United States. Mr. Mullins ended by stating that the

company has the right to discharge from an approved NPDES point source but the company is not required to discharge from that point.

Informal Hearing Recommendation

Upon completion of Mr. Mullins' oral comments, this hearing's officer traveled to the location of pond #3. A rock-lined spillway had been constructed for the outlet of this pond. Drainage from this spillway was running in a surface ditch down toward three additional ponds in series. The "drop box" that had been referred to was located to the right of the pond's embankment. It was a metal pipe that had been installed directly above and connected to the pipe that passed Callahan Creek beneath this portion of the permit area. The top of this pipe was open and approximately 3.5 feet above the ground surface. There is no physical way surface drainage from pond # 3 can enter into this pipe.

This hearing must decide if a violation existed as outline in N.O.V. CEV0006983. In evaluating this N.O.V., it is noted that the following facts are not in dispute. It was established that the inspector took a sample of the discharge from pond #3 at the end of the discharge spillway. This water was lab tested and found to be far above the allowed maximum daily limit for iron. It was also established that the drainage from the spillway of pond #3 entered into ponds 4, 5, and 6 prior to discharging into the waters of the United States. The discharge into Callahan Creek was in compliance with the maximum daily limit set for iron.

The first issue to be decided in this case is the physical location of NPDES outfall point 002. The correct physical location of this discharge point is crucial to determining if this violation was issued properly. The permittee maintains that the "drop box" was the location of the monitoring point and that it was high and dry; not the end of the rock spillway. If this is the case, then there was no discharge from NPDES outfall point 002.

The correct location of this outfall point must be based on the evidence that has been made available during this informal hearing. A careful review of revision # 9508863 that was approved in April of 2002 reveals that DMLR Water Quality reviewer Rodney Baker, prior to approval of this revision, required the permittee to include a "C" code (stands for change) for the outfall of NPDES point 002. This was required because the location of this outfall point was being slightly changed from what had originally been proposed in revision # 0502326. That revision (revision #0502326), approved in April of 2001, had proposed to install the "drop box" as the discharge point for pond # 3. Please see review comment number 5 from Rodney Baker for revision # 9508863 dated January 31, 2002 (see attachment # 4). Also the as-built pond # 3 certification dated May of 2001 shows a rock spillway as the discharge for pond # 3. The "drop box" is not shown on this certification. In fact the design sheets submitted with the 2009 annual pond certification (dated 10/27/09) for pond # 3 shows a rock spillway design for NPDES point 002. One final item that was reviewed was the monitoring data that has been submitted for this outfall point. DMLR records show that this point has discharged intermittently since constructed. A call to Environmental Monitoring, Inc. (EMI), the monitoring company for this permit, revealed that this pond had a discharge on 1/21/10. The evidence is overwhelming that NPDES outfall point 002 is located at the end of the rock spillway, not the "drop box".

The permittee also alleges that they did not discharge any pollutant into the waters of the United States since the discharge from pond # 3 flowed into 3 additional ponds prior to entering

Callahan Creek. At first glance, it would appear that there is merit to this argument. It is a fact that discharge from the permit area into Callahan Creek was in compliance. However, this case is not about whether or not a “pollutant” was discharged into the waters of the United States. This case is about whether or not the approved NPDES permit conditions were violated. A close review of the **NPDES Permit Conditions** for this permit makes it clear that discharges authorized by this NPDES permit shall be made in accordance with the terms and conditions of the permit. The terms and conditions of the permit require **each** authorized NPDES outfall point to be in compliance with applicable effluent limitations. This includes the NPDES outfall point 002. It has been established beyond doubt that NPDES outfall point 002 is located at the end of the rock spillway of pond # 3. It has also been established that a discharge occurred from this point source. This is the location of the water sample obtained by the DMLR inspector. This discharge exceeded the daily maximum limitation set for iron. The permittee’s failure to meet the required effluent limitation for iron is grounds for enforcement actions. The permittee is referred to section (a) **Duty to comply** of the **NPDES Permit Conditions** document. It is unfortunate that this monitoring point was not deleted from their approved NPDES permit prior to this event since this drainage does pass through additional structures prior to discharging into the waters of the United States.

It is my decision that a violation did occur due to the discharge from NPDES outfall point 002 and that the violation was properly written. I recommend that N.O.V. # CEV0006983 be affirmed.

Informal Hearings Officer: _____
James Lowe

Date: 3/22/10